NO. 48470-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

DAVID DEVON JACKSON, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-00218-0

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

A jury found David Jackson (hereafter 'Jackson') guilty of one count of Rape in the Second Degree by forcible compulsion for an incident that occurred on August 20, 2014 against victim A.O. CP 1-2, 44.

At trial the State presented the testimony of several witnesses. Robert Taylor testified that he worked as a gas station clerk at the Chevron in downtown Vancouver in August 2014. RP 2. One night while he was on duty, between the hours of 1am and 5am, a woman showed up at the gas station asking for help. RP 3. The woman came up to the service window at the gas station and knocked on it; she seemed "pretty out of it" and did not know where she was, appearing confused and disoriented. RP 4. Mr. Taylor called 911 and asked for an ambulance. RP 5. An ambulance and police arrived to help the woman. RP 5.

Officer Brian Billingsley of the Vancouver Police Department responded to Mr. Taylor's 911 call for help for an upset woman at the downtown Vancouver Chevron during the early morning hours of August 21, 2014. RP 8-10. Officer Billingsley made contact with the woman, who was upset and crying. RP 10-11. The woman also appeared to be paranoid

and was looking around as if to look for another person. RP 11. Officer Billingsley had a hard time getting information out of the woman. RP 12. She eventually identified herself as A.O. by her ID card and said she came from Tacoma. RP 12. A.O. told the officer that she had met a male on a social website, that she met up with him at a gas station in Tacoma and they went for a ride. RP 14. A.O. further told Officer Billingsley that the male had given her pills, but she did not know what they were. RP 14. A.O. did appear to be under the influence in Officer Billingsley's opinion. RP 14. AMR arrived and assessed A.O. and spoke with her. RP 15. Officer Billingsley attempted to ask A.O. more questions about what happened, if anything had happened, whether she was hurt, etc., but she shut down and would not answer his questions. RP 15. AMR then took A.O. to the hospital and Officer Billingsley had no further contact with her.

Taylor Hauck, an EMT IV tech with AMR, and John Mosely a paramedic with AMR received a call for service at 5:07am on August 21, 2014 to respond to the Chevron in downtown Vancouver. RP 99-102, 178. There, they met with A.O., an 18 year old female. RP 104. Mr. Mosely did the initial assessment of A.O., and they transported her to PeaceHealth medical center, a nearby hospital. RP 180. A.O. was emotionally distraught and hyperventilating a little. RP 105. A.O.'s chief complaint

was of groin and mouth pain. RP 180. On the way to the hospital, Mr. Hauck tended to A.O. in the back of the ambulance. RP 180. During the ride, A.O. told Mr. Hauck that her mouth hurt and it felt like her tonsils had been removed; she said she met a guy in Tacoma and took what she thought was an Advil from him, but her memories on the rest of the night were unclear. RP 181. A.O. told Mr. Hauck she had been sexually assaulted. RP 181.

At the time of trial, A.O. was a 5'2.5" tall, 19 year old female whose highest level of education was the 8th grade. RP 23-24, 26. A.O. grew up in Tacoma, and after leaving school she worked at several fast food restaurants in the Tacoma and Kirkland area. RP 23-25. When A.O. was 16 years old, her boyfriend got her involved in prostitution; A.O. feels she was forced or tricked into it. RP 26. She worked as a prostitute for a few years, setting up her work over the internet. RP 27. One of the websites she frequented was called "Tagged." RP 29. "Tagged" is a social media website to meet new people. RP 29. On this website, a person creates a profile that includes their name, location, age and photos. RP 30. In August 2014, A.O. connected with a man named "David" from this website. RP 30. At this time, A.O. lived in hotels in Tacoma near Hosmer Street. RP 28.

One night in August 2014, A.O. went to a gas station in Tacoma and the man she knew from the "Tagged" website as "David" was there. RP 34. This man rolled down the window to his car and told her to come over. RP 34. A.O. recognized him from the website and went over to him. RP 35. A.O. identified the Jackson as this man while testifying in court. RP 36. A.O. believed she and Jackson were going to "kick it" or "hang out." RP 35-36. A.O. got into the car and Jackson drove them off. *Id.* Soon into the car ride, Jackson headed south towards Portland, and he became "dominant," making A.O. agree with things he was saying. RP 39. Jackson asked her sexual things, like if she knew "how to suck dick" and other things. RP 40. Jackson knew A.O. worked as a prostitute. RP 40. At this point A.O. wanted to get out of the car and told Jackson multiple times she wanted to get out. RP 41. Jackson told her that he owned her and she could not do anything. RP 41. Jackson took A.O.'s cell phone from her and put it in the front of the car, but would not let her touch it. RP 41. A.O. was afraid and became very quiet. RP 42. At some point, A.O. asked him where they were going, and Jackson started telling A.O. that she was going to be a stripper. RP 42.

During the car ride, Jackson touched A.O. on her thigh, her vagina, her breast and mid-stomach. RP 45-46. A.O. did not want Jackson to touch her and told him she did not want to do anything with him. RP 47. Jackson

continued touching her, and put his hand underneath her clothes and down her pants and put his finger into her vagina. RP 47-48. Jackson was roughly touching her vagina and clawing at her. RP 49. Jackson was angry because A.O. was crying. RP 49. At one point, Jackson made A.O. "suck his dick" by grabbing her head and pulling it down to his crotch. RP 51. A.O. was saying "no – no – no" and pulled her head back. RP 51. Jackson forced A.O.'s head down and his penis entered her mouth. RP 52. Jackson ejaculated, and A.O. gagged, and vomited a little. RP 51-53. Jackson's ejaculate got on A.O.'s sweater. RP 55.

At some point Jackson gave A.O. some pills and told her they were for pain. RP 59. A.O. had told Jackson she hurt because her vagina hurt from what he had done to her with his hands. RP 59-60. Jackson also tried to "have sex" with A.O., A.O. believes anal intercourse was his intent, but then used his fingers to scratch at her and slightly penetrate her anus. RP 61-62. Jackson also used his arm and hands around her neck to hold her down or choke her. RP 63.

Jackson indicated he needed to go to an apartment to talk to a stripper, and had A.O. get out of the car; he also got out of the car and at some point A.O. lost sight of him and realized Jackson had left. RP 65-66. A.O. did not know where she was, or even what city she was in. RP 66. She saw a Chevron and went over to it for help. RP 66-67. A.O. felt

panicked and not in a good place, mentally or emotionally. RP 67-68. A.O. remembers going to the hospital and talking to the nurse and telling her what had happened. RP 69.

Jillian Zeisler is a sexual assault nurse examiner who was called in to examine A.O. during the morning hours of August 21, 2014. RP 124. The sexual assault nurse, Jillian Zeisler, testified that when she does a sexual assault examination, her primary goal is making sure her patient is ok and to determine whether the patient needs imminent medical treatment. RP 117-18. When Ms. Zeisler first met with A.O., A.O. was very tearful and upset. RP 125. She remained that way throughout the entire examination. RP 128, 132. A.O. told Ms. Zeisler that she was contacted in Tacoma at a gas station by a man she thought would be a client. RP 129. The man asked her to get into his car and he drove them away and onto the freeway. RP 129-30. The man began to touch her on her thigh, breasts, back and under her shirt. RP 130-31. A.O. told Ms. Zeisler that he gave her some pills that he said were pain medication and told her she needed to take them because this was going to hurt. RP 131. A.O. said that the man stopped the car at a rest area and forced her to perform oral sex on him, and that she gagged and vomited when he ejaculated. RP 132. A.O. described the man "playing" with her vagina for a long time and making her lick his fingers. RP 133. She also described

the man as pushing her head against the window to the vehicle. RP 132. A.O. described for Ms. Zeisler that the man had long fingernails and it hurt a lot when he touched her; he was pinching and twisting her nipples, clitoris, ear and lips. RP 133-34. A.O. told Ms. Zeisler that the man had her get on her knees on the passenger seat and he got behind her and put his penis in her butt. RP 134. A.O. described screaming and the man digging his nails into her neck. RP 134. She said that the man gave her juice which altered her mental state and then left her at an apartment complex afterwards. RP 141.

During the examination, Ms. Zeisler noted A.O. was tender and sore to her head, and had three abrasions under her chin onto her neck. RP 144. A.O. also had a new bruise to the top of her left hand. RP 145. A.O's external genitalia were raw and excoriated, meaning it was as if someone was "scratching [the] skin over and over and… …the skin has started to get raw…." RP 148. The areas that Ms. Zeisler observed to be raw were A.O.'s clitoris, labum majora, labum minora, vaginal orifice and her fossa evicular (area between the vagina and anus). RP 149. The excoriation to A.O.'s genitalia was not normal. RP 149-50. A.O. was tender and sore to the touch, and told Ms. Zeisler she believed she was torn internally. RP 150. A.O. appeared to be in pain, and could not tolerate a speculum examination so that Ms. Zeisler could observe A.O.'s internal genitalia.

A.O. also complained of pain to her anus and Ms. Zeisler noted anal spasms. RP 152. Anal spasms are something Ms. Zeisler is on the lookout for in sexual assault cases. RP 152.

Ms. Zeisler collected blood and urine samples, and A.O.'s jacket was tested for DNA. RP 155-56, 280. There was semen found on A.O.'s jacket that matched Jackson's DNA. RP 287. A.O.'s blood and urine showed the presence of methamphetamine. RP 356-57.

Jackson did not testify, and no statements of his were offered into evidence.

Prior to trial, the State filed motions in limine to admit statements A.O. made to Ms. Zeisler. Supp CP __[1] (State's Motions in Limine). This motion, and others, were heard by the Court several days prior to trial. Supp CP __ (Clerk's minutes from December 2, 2014). Jackson did not have these hearings transcribed. The trial court ruled the statements A.O. made to Ms. Zeisler were admissible pursuant to the medical hearsay exception under ER 803(a)(4). *Id.*

In his closing argument, the defense attorney capitalized on A.O.'s inconsistent statements. He stated, "[h]er statements on the witness stand tell us that it didn't happen the way she said to the nurse. Her statements

[1] The State filed a Supplemental Designation of Clerk's Papers on August 18, 2016. At the time of filing this brief, the Clerk has not assigned page numbers to these supplemental documents. For ease of understanding, the State therefore also identifies the document by title in parenthesis following the blank CP designation.

on the witness stand will tell us that it's not the same as when she spoke to the nurse." RP 415. He later told the jury:

> The nurse at the hospital – Ms. Zeisler – says it was reported by Ms. O'Bannion that she thought Mr. Jackson was a client for the night – for prostitution.
>
> Ms. O'Bannion in her testimony before the court says no I didn't expect anything. I thought we were just going to go hang out. Well it's inconsistent.
>
> To the nurse she – Ms. O'Bannion indicates I met somebody and I thought he was going to be a client for the night and we had sex and she claims – Ms. O'Bannion here – that she was (inaudible) – she had digital penetration and then she makes the claim anal penetration.
>
> But we know that's not true because Ms. O'Bannion on the stand – here before this court – said no, there was no anal penetration – there was no penetration. He might have touched me on the outside but it wasn't anything like that. So it's inconsistent with her statement that she made.

RP 417-18. Defense counsel then continued, "But we know it didn't happen because she testified on the stand that it didn't happen," referring to the penetration she described to the nurse. RP 419.

The jury acquitted Jackson of the greater crimes of Rape in the First Degree and Kidnapping in the First Degree and convicted him of one count of Rape in the Second Degree by forcible compulsion. CP 41, 42, 43, 44, 47. The trial court sentenced Jackson to a standard range sentence and he timely filed this appeal. RP 52; 66.

ARGUMENT

I. Jackson received effective assistance of counsel.

Jackson claims he received ineffective assistance of counsel because he claims his attorney did not consult with an expert witness to prepare for the nurse's testimony.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable."

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see*

also State v. Cienfuegos, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable

legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that "but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the "distorting

effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time." *Id.* at 689. The reviewing courts should be highly deferential to trial counsel's decisions. *State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel's performance *Strickland*, 466 U.S. at 689-91.

"[T]he decision whether to call a particular witness is a matter for differences of opinion and therefore presumed to be a matter of legitimate trial tactics." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 742, 101 P.3d 1 (2004). The failure to call a defense expert witness is, likewise, considered strategic. *State v. Mannering*, 150 Wn.2d 277, 287, 75 P.3d 961 (2003). Even if the reviewing court finds defense counsel was deficient for failing to call a defense expert, the defendant must demonstrate the result of the proceeding would have been different, if a defense expert testified, in order to prevail on a claim of ineffective assistance of counsel. *Mannering*, 150 Wn.2d at 287 (stating "[e]ven if counsel's decision not to call Dr. Trowbridge was wrong, his potential testimony as to Mannering's intent would have been refuted by her own admission...[and] [t]he result of the proceeding would not have been

different").

First, Jackson has not established that such a consultation never occurred; he has only shown that in one request for indigent defense services Jackson did not request public payment for an expert witness. Jackson also has never discussed nor established his defense attorney's qualifications and prior experience. An attorney who has tried dozens of felony sexual assault cases may be in a better position to effectively determine from his knowledge and past experiences whether a case has an arguable challenge to medical testimony or not. The record does not establish Jackson's attorney's history one way or another and is entirely silent on the subject. This Court should not infer any facts from a silent record.

Secondly, Jackson has not and cannot show prejudice. Jackson wholly fails to argue he was prejudiced by his defense attorney's performance. In order to prove ineffective assistance, Jackson must show that had his attorney conducted the complained-of failure, that the result of the proceeding would have been different. *See State v. Sardinia*, 42 Wn.App. 533, 539, 713 P.2d 122, *rev. denied*, 105 Wn.2d 1013 (1986). Here, there is absolutely no showing that Jackson's attorney's failure to call an expert medical witness would have made any different in this case. There is simply no showing that there was an expert who could have

offered testimony helpful to Jackson. This Court should not presume or infer the existence of such an expert from a silent record. *See State v. Thomas*, 109 Wn.2d 222, 233, 743 P.2d 816 (1987) (Dolliver, dissenting).

Even assuming arguendo that no consultation with a medical expert occurred, and that counsel was not experienced and knowledgeable enough from past cases to effectively analyze whether such a consultation was necessary for Jackson's case, failure to consult an expert is not per se prejudicial. *State v. Garcia*, 57 Wn.App. 927, 934, 791 P.2d 244 (1990). In order to show prejudice, Jackson must show that he had a viable defense through an expert witness of his own. *See id.* There is no evidence that any subject of the nurse's testimony, if rebutted, could have proved a viable defense for Jackson. Absent such evidence, this Court cannot conclude that calling or consulting with an expert witness would have changed the outcome of the trial.

In *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 742-43, 101 P.3d 1 (2004), the Supreme Court held that to prove the prejudice prong of an ineffective assistance of counsel claim, the defendant on appeal must show that an uncalled witness's testimony would have provided significant new facts or evidence that could have led the jury to come to a different conclusion. In *Davis*, the State employed an expert to test hair samples and blood stains from the crime scene and the defendant's shoe. *Id.* at 741.

Defense counsel had his own expert attend the State's expert's testing of the hair samples; defense's expert saw no problems with the State's expert's testing and did not dispute the conclusion, but did express concerns with the accuracy of the hair testing process. *Id.* at 742. Defense did not call its expert at trial and the Supreme Court denied Davis's ineffective assistance of counsel claim stating that the defense expert could not "provide any significant new facts or evidence that might have led the jury to a different conclusion" and Davis could not therefore show prejudice. *Id.* at 742-43. The same is true here. Jackson cannot show from the record below that any defense expert could have provided new information that would have allowed the jury to come to a different conclusion. Jackson alludes to the idea that defense counsel should have explored other causes for the victim's injuries to her genitalia, yet offers nothing to support the idea that this exploration would have been to Jackson's benefit. Jackson cannot show whether his attorney conducted a pretrial interview of the nurse, and cannot show that his attorney did not explore those issues with the nurse during pre-trial preparation and investigation. Jackson cannot show that had his attorney asked the nurse about other potential causes for the types of injury that she would have answered favorably for him. The nurse very well could have said nothing but nonconsensual sexual intercourse could have caused those injuries had

Jackson's counsel asked such a question. As it was, the State's direct examination of the nurse was somewhat downplayed in that the State did not inquire as far as it could have into the cause and significance of such injuries to a victim's genitalia. The State only elicited that the victim had three scratches on her neck, her exterior genitalia were raw, she had a bruise on her hand, and that these injuries were consistent with her report to the nurse. The nurse did not go into detail about the level of force necessary to rub a woman's labia major raw, or to even describe the mechanism by which these injuries would have occurred. The nurse never testified that the injuries observed were only caused by nonconsensual sexual intercourse, or a nonconsensual assaultive attack, but only that they were consistent with the victim's report. Had Jackson's counsel delved further and asked more probing questions about the injuries, causation, and necessary force to obtain such injuries, the answers were unlikely to help his case and were only likely to further the jury's conviction that he was guilty of raping A.O.

Jackson has not and cannot show prejudice from his attorney's conduct in investigating the case and cross-examining the nurse. Jackson's claim of ineffective assistance of counsel is meritless.

Jackson also argues his counsel was ineffective for failing to object to testimony from nurse Jillian Zeisler. Specifically, Jackson argues his

counsel should have objected to Ms. Zeisler relating statements the victim made to her during the course of her medical examination. Though Jackson does not specifically argue prejudice, in order to succeed on an ineffective assistance of counsel claim, he must show that had his attorney objected, such an objection would have been granted, and the complained-of statements would have been excluded. What Jackson fails to inform this Court of is that the admissibility of the statements he now complains of was litigated pre-trial in a hearing before the Superior Court. Jackson did not have the proceedings held on December 2, 2015 transcribed, however supplemental clerk's papers designated by the State show that the State moved in limine to admit statements the victim made to Ms. Zeisler under ER 803(a)(4) as statements made for the purpose of medication diagnosis or treatment. Supp. CP __ (State's Motions in Limine). Jackson's attorney also filed his own document entitled "Motion in Limine" in which he requested a hearing on the admissibility of statements under ER 803(a)(4) prior to the witness testifying. Supp CP __ (Defense Motion in Limine, p. 2). Further, the clerk's minutes from the hearing on December 2, 2015 show that during a pre-trial hearing, the trial court heard testimony from Jillian Zeisler, Jackson's attorney cross-examined her, and heard argument on whether the medical diagnosis or treatment exception to the hearsay rule applied to the statements the victim made to Ms. Zeisler. Supp CP __

(Clerk's Minutes, p. 4). Clearly, defense counsel attempted to keep out the victim's statements through the nurse. Counsel was not ineffective in any way Jackson claims. Jackson claims his attorney did not object to the admission of these statements, yet it's clear his attorney opposed the State's motion to admit, which is equivalent to objecting to their admission. The purpose of objecting is to prevent admission, but also to preserve an issue for appeal. Jackson's claim of ineffective assistance is meritless as the initial premise – failure to object – is simply untrue, but also, no prejudice could be shown as we know without a doubt how the trial court ruled from the record as supplemented by the State. Jackson's claim fails.

Furthermore, Jackson's attorney did what he could to turn this ruling to his advantage, and highlighted the victim's inconsistent statements to the nurse from how she testified at trial. In a he said/she said type of sexual assault case, a showing of inconsistency on the victim's part is a defense attorney's dream. As Jackson notes in his opening brief – his attorney was "very competent and effective" and did the best he could with a damning amount of evidence against his client. His attorney skillfully turned an unfavorable pre-trial ruling to his advantage as best he could by capitalizing on the inconsistencies in the victim's various statements. Counsel was entirely effective and Jackson received a fair

trial. He was fairly and properly convicted of Rape in the Second Degree. The trial court should be affirmed in all respects.

CONCLUSION

Jackson has not shown that he was denied effective assistance of counsel. His conviction should be affirmed.

DATED this 18 day of August, 2016.

Respectfully submitted:

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